

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS M. HARLEY

Appellant

- v -

UNITED STATES OF AMERICA

Appellee

710

No. 20,285

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 29 1966

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TITLE PAGE

THOMAS M. HARLEY,

Appellant

UNITED STATES OF AMERICA,

Appellee

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STATEMENT OF QUESTIONS PRESENTED

I. Was appellant entitled to rely on doctrine of irresistible impulse without the necessity of injecting insanity as a defense and undergoing psychiatric tests?

II. Should evidence of the prior convictions of appellant have been barred from admission into evidence, in view of the fact that credibility was not truly an issue, and was the Court's explanation to appellant as to what convictions could be admitted correct?

III. Was appellant entitled to suppress the admission into evidence of Government's Exhibit No. 1, the gun with which the assault was allegedly committed?

JURISDICTIONAL STATEMENT

Appellant, a resident of the District of Columbia, was accused of assaulting with a dangerous weapon, another individual, said assault occurring within the confines of the District of Columbia. Title 11, Section 306 of the D.C. Code, 1961 Edition, confers jurisdiction for this type crime in the United States District Court for the District of Columbia. Following a trial and conviction in that Court, this appeal of right follows to the United States Court of Appeals for the District of Columbia Circuit.

STATUTES INVOLVED

Title 14, Section 305, D.C. Code, 1961 Edition. No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers as to such matters....(remainder of statute not pertinent.)

STATEMENT OF POINTS

I. The Court erred in not permitting appellant to rely upon irresistible impulse as a defense.

II. The Court erred in explaining what prior convictions could be brought to the attention of the jury and in further ruling that prior convictions would be admissible.

III. The Court erred in failing to sustain counsel's objection to admission into evidence of the gun in question.

The company of two other men, continued walking down the street after this incident and went into a carry-out shop.

Word of the incident was gotten to appellant who, upon learning three men were involved, procured a pistol and went off his daughter and son to the carry-out shop. Thorpe was thereafter pointed out to appellant and when questioned about the incident, Thorpe stated the same.

Appellant, with the pistol in his hand, struck Thorpe along the side of the head, and in doing so, the gun discharged, the bullet entering the body of Thorpe.

Police, in the vicinity at the time, heard the shot and immediately placed appellant under arrest. Appellant was taken to the police

STATEMENT OF CASE

The appellant stands convicted of assault with a deadly weapon and carrying a pistol without a license.

This matter arose when one Joseph L. Thorpe molested appellant's sixteen-year-old daughter while she was seated on the fender of an automobile, by placing his hand on her knee and moving his hand up underneath her dress. Thorpe was unknown to appellant's daughter and this touching was unsolicited and uninvited. Thorpe, who was in the company of two other men, continued walking down the street after this incident and went into a carry-out shop.

Word of the incident was gotten to appellant who, upon learning three men were involved, procured a pistol and went with his daughter and son to the carry-out shop. Thorpe was thereupon pointed out to appellant and when questioned about the incident, Thorpe denied the same.

Appellant, with the pistol in his hand, struck Thorpe along the side of the head, and in doing so, the gun discharged, the bullet lancing the scalp of Thorpe.

Police, in the vicinity at the time, heard the shot and immediately placed appellant under arrest. Appellant was taken to the police

station, questioned, and upon assurances of the officers that they were attempting to help him, advised them where the gun could be located, which was not in his possession at the time of the arrest. Indictment, trial and conviction followed.

SUMMARY OF ARGUMENT

I

Under the confines of Durham, infra, and the defining of insanity as expressed in Hawkins, infra, appellant was prevented from urging the defense of irresistible impulse based not on an abnormal condition of the mind, but based upon a natural reaction, instinctive in a father, whose child has been molested. The reaction of appellant may have been that of a more aggressive individual, but aggressiveness is not considered a mental disease or defect. It may have been the reaction of an uneducated man, but lack of education is not considered a mental disease or defect. It may have been the reaction of one who for one reason or another does not find satisfaction with the police department, but this also does not constitute a mental disease or defect.

In short, appellant was severely prejudiced in the presentation of his case when he was not permitted to urge irresistible impulse as a defense and to go outside of the facts pertaining to the particular crime with which he was charged, and introduce evidence reflecting upon a prior molestation of his young son. Under the facts of the case as presented the Court should have permitted, or this Court should rule that there was a basis for the irresistible impulse doctrine applying, without the necessity of psychiatric testimony or evaluation being considered.

II

A case of this nature did not warrant appellant's criminal record being introduced into evidence against him. It would not act to im-

peach his credibility, but only to prejudice the jury against him and cause them to overlook the compelling reasons for the action taken by appellant against Thorpe.

Further, the explanation of the Court to appellant concerning the question of whether appellant was going to testify was inaccurate and misleading as it indicated that all of the appellant's prior convictions could be used against him rather than just those which might have been substantially relevant to the offense with which he was charged and crimes involving moral turpitude. Had the explanation been more precise, it may have been that appellant would have voluntarily taken the stand and given an explanation for those convictions which might have been used against him.

III

Since the police officers in interrogating appellant did not fully advise him of the implications which could result if the gun with which the assault was committed was produced, the trial Court should have permitted the same to be suppressed. Information concerning the whereabouts of the gun was procured only by misleading appellant and causing him to believe that the police were completely sympathetic to the action which he had taken.

ARGUMENT

I

At the preliminary conference before the trial judge, immediately preparatory to trial, the issue of irresistible impulse was raised. At that time, the Court indicated, pages 4 through 9 of the transcript, that if this issue were raised it would send appellant to St. Elizabeth's Hospital for a ninety-day examination. Appellant, upon being advised this, indicated that he did not want the issue of insanity injected into the trial.

The facts of this case are somewhat different from the usual situation where the defense of insanity is raised. The Court, from reading the transcript, has noted that appellant is the father of a sixteen-year-old girl whose dignity and privacy was admittedly violated by one Joseph L. Thorpe, who placed his hand on the leg of this young girl in an apparent attempt to touch her private parts. This young girl was unknown to Thorpe, who committed this act while walking past her while she was seated on the fender of an automobile. Immediately following this incident and insult to her person, her father, the appellant, was informed of this situation, and he went looking for the man who had assaulted his daughter.

Certainly, at this time, reason was not prevailing, as he should have informed the police. Further, in going to the defense of his

daughter, he took with him a gun, which he should have left at home.

However, his actions should have been permitted to be judged by the jury in light of all of the circumstances which included facts not permitted to be introduced at the time of trial. Such were that his young son had been assaulted by a sexual deviate only a month before. Viewed in this light, the reaction of appellant may not have been considered unreasonable by a jury, familiar with the crime situation in the District of Columbia. Further, the reaction of appellant and the action taken by him, falling into the category of paternal instinct, may well have been determined by a jury to be the result of an irresistible impulse, but not the type such as would require expert medical testimony, but rather of such a nature that it would fall within the experience of the average juror, especially if he or she were parents.

This situation does not appear to be contemplated by the decisions of this Court in Durham v. U.S., 94 U.S. App. D.C. 228, 214 F. 2d 862, or Hawkins v. U.S. 114 U.S. App. D.C. 44, 310 F. 2d 849. The jury could have found that this was a normal, albeit not prudent, reaction on the part of the appellant and that the instruction of the case of Smith v. U.S. 50 App. D.C. 144, 36 F. 2d 548, on irresistible impulse would be proper. Of course, irresistible impulse in this light could be considered to include a basic instinct or driving force in man to protect his children from the assaults of persons like Thorpe.

introduction into evidence of prior convictions of a defendant. These

The fact that appellant may have reacted differently from another person faced with the same circumstances does not in and of itself warrant his being faced with the choice of pleading insanity as a defense, which may not properly apply, or with proceeding to trial in the hopes that the prosecution might fail to prove one of the elements of the charge. Being stripped of an irresistible impulse defense, appellant was likewise prohibited from introducing evidence regarding the prior molestation of his son, as the same was no longer relevant to the issues being tried.

Under circumstances such as outlined above, it is urged that psychiatric evaluation or a plea of insanity based upon Durham, is neither warranted nor necessary. What appellant did was based in part upon a father's natural reaction, and in part upon environmental factors in which appellant has been raised, and in part upon his personality. He was not afforded the luxury of being the well-educated respected citizen of mild temperament, but this should not mean that his reaction must be regarded as one falling within the limitations of the doctrine of insanity, and to deprive him of the opportunity of submitting all the facts to the jury was to take away from him any defense which he might have and over-whelmingly prejudice his case.

II

Throughout the years, certain limitations have been placed upon introduction into evidence of prior convictions of a defendant. These

have recently been spelled out in Drew v. U.S., 118 U.S. App. D.C. 11, 331 F. 2d 85.

The five major exceptions to admission of other crimes are ones which were totally irrelevant in the trial of appellant's case. The only area wherein admission of prior convictions would be admissible would be in that of credibility. However, this was not a situation where there were no eye witnesses to the crime. It was not a case of a defendant denying that he either committed a crime or was in the area at the time a crime was committed. In fact, the testimony was completely to the contrary. Appellant's daughter testified that appellant did in fact strike Thorpe on the side of the head. This testimony was offered during appellant's case, on his own behalf.

There is thus nothing really in which the credibility of appellant would have become an issue. However, the trial Court not only explored the prior criminal record of appellant, as will be seen in pages 95 through 105 of the transcript, but also advised appellant that the Court would be compelled to instruct the jury that evidence of his prior convictions could be admitted for purposes of testing his credibility. This was all in conformity with Title 14, Section 305, of the D.C. Code, 1961 Edition.

In a case such as the present, appellant was again faced with the choice of taking the stand and attempting to explain his actions, or of remaining silent. He knew that if he did take the stand, his prior

convictions would be used against him, and there was no limitation set forth by the judge as to what crimes would be admitted. In fact, the statements of the Court were such that the appellant was led to believe that all of his prior convictions could be introduced into evidence against him. Certainly, this was an unfair representation.

Appellant, as this Court will note, did have several convictions against him at the time of this trial. If evidence of these convictions was admitted against him, undoubtedly the jury would be influenced and would probably convict appellant, not on the basis of the facts of this case, but on the fact that he had been convicted on occasions in the past on other offences. Certainly, admission of his prior convictions would have been highly prejudicial to appellant.

It is interesting to note the limitations placed upon the admission into evidence of prior convictions. They must meet rigid standards before they can be admissible. They are treated in a separate category and are something distinct and unusual in the Rules of evidence. Ordinarily, when dealing with credibility, prior inconsistent statements may be admitted without question, as long as they are relevant to the issues being tried. But prior convictions are similar in some respect to the admission of prior accidents of a defendant in negligence cases. There is truly no relationship between prior accidents and the negligence of a defendant in a current accident. Likewise, there is truly no relationship between prior convictions and a current indictment or

information, especially when the presumption is that of innocence.

Permitting the use of prior convictions overlooks completely the fact that a man's character and behavior may change. What a man did which was illegal or immoral on past occasions should not be permitted into evidence at a later trial as tending to show that that man is still currently immoral or unworthy of trust or belief. Such is completely violative of the principle of innocence until proven guilty.

The Courts, such as in Drew, supra, have recognized the likelihood that juries will make an improper inference when evidence of prior convictions is admitted into evidence, and they have presumed prejudice in such circumstances, resulting to the defendant.

Thus, it is urged that in situations such as existed in this case, that the advising of appellant that his criminal record could be admitted against him was erroneous in that it was not specifically limited as required by the decisions of this Court, and further that appellant was prejudiced by the fact that any portion of his criminal record could be used to discredit his testimony, when in fact there was truly nothing to discredit, and when the result would have been only to inflame the jury against him by virtue of his past criminal record.

III

Appellant, during the course of the trial, objected to the admission into evidence of the gun which was used during the commission of the

information, and the organization is not of importance.

For the purpose of the investigation, the following information is being furnished:

1. The name of the person or persons who furnished the information.

2. The date and place where the information was obtained.

3. The name of the person or persons who received the information.

4. The name of the person or persons who furnished the information.

5. The date and place where the information was obtained.

6. The name of the person or persons who received the information.

7. The name of the person or persons who furnished the information.

8. The date and place where the information was obtained.

9. The name of the person or persons who received the information.

10. The name of the person or persons who furnished the information.

11. The date and place where the information was obtained.

12. The name of the person or persons who received the information.

13. The name of the person or persons who furnished the information.

14. The date and place where the information was obtained.

15. The name of the person or persons who received the information.

16. The name of the person or persons who furnished the information.

17. The date and place where the information was obtained.

(18)

18. The name of the person or persons who received the information.

19. The name of the person or persons who furnished the information.

assault. As appears on Page 81 and Page 113 of the transcript, the gun came into the possession of the police by virtue of what the appellant told them at the time of his arrest.

What does not appear in the record, but must be mentioned on behalf of appellant, is that he was informed by the arresting officers that they were very sympathetic toward him but would be unable to help him unless he produced the gun in question. In fact, one of the officers had indicated to him that he would have actually shot Thorpe rather than just strike him with the gun, had the same thing happened to his daughter. All of this was said to the appellant without explaining to him the implications which would result from the production of the gun. In other words, he was not fully legally advised of his rights.

Admittedly, this occurred prior to the decision of the Supreme Court in Miranda v. Arizona, 384 U.S. 436, but it does seem that appellant was not properly warned, and that the gun should have been excluded from evidence.

As indicated, some of the statements contained herein do not appear in the record, but counsel is constrained to call them to the attention of the Court in order that justice might be served.

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,285

THOMAS M. HARLEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals _____
for the District of Columbia Circuit

FILED FEB 3, 1967

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Cr. No. 177-65

QUESTIONS PRESENTED

1) Was it error for the trial court to rule prior to the commencement of the trial that appellant might not adduce evidence that his son had been sexually molested by a third party in an unconnected incident some weeks before the assault here in controversy, and to rule that an "irresistible impulse" instruction might not be requested at the conclusion of the trial, when appellant specifically instructed his counsel not to raise the defense of insanity and the court, by interrogating appellant personally, determined that appellant indeed did not desire an insanity defense and that he was competent to make that decision?

2) Was it error for the trial court to intimate that if appellant testified his prior conviction record might be utilized by the prosecutor in a situation where appellant did not desire to testify, trial counsel's judgment was that it would be better for appellant to refrain from testifying, the court insured itself of these facts by interrogating appellant personally and advising him of the consequences of his decision to testify, and the court was never requested to exercise its discretion under *Luck* to curtail the use of appellant's prior record if appellant decided to testify?

3) May appellant challenge the admission into evidence of the gun with which this assault was committed on the basis of unsworn allegations made on appeal for the first time and never presented to the trial court?

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*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,285

THOMAS M. HARLEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment returned on February 23, 1965, appellant was charged in two counts with assault with a dangerous weapon, 22 D.C. Code § 502 (1961), and carrying a dangerous weapon, 22 D.C. Code § 3204 (1961). A plea of not guilty was entered at appellant's arraignment, held on February 26, 1965. Trial before Judge Luther Youngdahl and a jury occurred on April 25 and 26, 1966,¹ at the conclusion of which appellant was found

¹ The jacket entries on the District Court record explain the 14-month interval between indictment and trial thusly: At arraign-

guilty on both counts of the indictment. On June 3, 1966, appellant received prison sentences totalling two to six years (two to six years for assault with a dangerous weapon and one year for carrying that weapon, the sentences to run concurrently). His *in forma pauperis* appeal to this Court has followed.

Three days before the start of the trial, a discussion concerning the possible interjection of the insanity defense was held between the attorneys, appellant and Judge Youngdahl. Defense counsel reported to the court that he had been instructed by his client not to raise the defense (Tr. 4), even though counsel thought that the doctrine of irresistible impulse might have some applicability to the facts of the case (Tr. 4-5). The Court instructed counsel that either insanity was or was not going to be an issue in the case, that the decision whether or not to raise the defense ought to be made in advance of trial, that irresistible impulse as a defense to criminal

ment on February 26, 1965, trial was set for April 26, 1965, but on that date was continued to the week of June 7, 1965 at the request of defense counsel who, the notation indicates, was attempting to locate a material witness. On June 7, a continuance was granted to the week of June 28, 1965, at the request of defense counsel, who was engaged in trial (and also because of the illness of a defense witness). On June 28, the trial was continued to the week of July 19, 1965, defense counsel being engaged in trial. On July 22, a continuance to August 23, 1965 was granted, no explanation appearing in the jacket entries. On August 23, a defense request for a continuance to October 13, 1965 was granted, because counsel desired more time in which to obtain witnesses. The entries reflect three consecutive continuances on October 13, October 28 and November 17, 1965 on the authority of the assignment office, apparently because no judges were available to try the case. On December 20, the trial was continued to February 16, 1966, at the request of the Government but explicitly without defense objection. Two more assignment office continuances occurred on February 16 and March 24, 1966. On April 21, 1966, appellant was not present, a bench warrant was issued, and the trial was put over to the following day. On April 22, the case was specifically set for April 25, 1966 (Tr. 9-11), on which date trial actually did commence. During this entire period, appellant was on \$1000 bond. No speedy trial contention has ever been suggested at any point in the history of this case.

conduct existed only in the context of an insanity defense, and that if insanity was to be raised, a mental examination of appellant at Saint Elizabeths Hospital would be in order (Tr. 5-6). Thereupon, Judge Youngdahl questioned appellant himself on his feelings with regard to a possible insanity defense and with regard to his competency to make that decision and, in general, to go to trial (Tr. 7-8). Appellant specifically stated that he did not wish the defense to be raised (Tr. 7-8). In this context, defense counsel agreed that insanity was not to be an issue in the trial, and that no insanity-type instruction would be requested at the conclusion of the trial (Tr. 8-9). It was also agreed between the parties before commencement of the trial that the fact that appellant's son had been sexually molested some weeks before the incidents in question in this trial would not be elicited, as it had no bearing on the guilt or innocence of appellant for the incidents charged in the indictment (Tr. 12-13).

The Government's case in chief was commenced by the testimony of one Joseph Tharpe, an airman third class in the United States Air Force, who, on December 11, 1964, was on Nichols Avenue, Southeast, with two companions, walking toward a carryout shop located at 2513 Nichols Avenue. As the trio approached the shop, they passed a girl, whom Tharpe did not know (Tr. 38), who was sitting on the fender of an automobile facing the sidewalk (Tr. 36-37). As he passed her, Tharpe touched the girl on her knee (Tr. 37). The girl, it developed, was appellant's 16-year-old daughter (Tr. 39, 105-106). After the touching, the girl said something of a profane character and the three men kept walking toward the carryout shop (Tr. 38, 47). After they had arrived and Tharpe had ordered a sandwich, appellant (specifically identified, Tr. 53) entered the shop, approached Tharpe, and said "I'm going to get you" (Tr. 38-39). After appellant's daughter, who had accompanied him to the shop, pointed to Tharpe, appellant "came in and shot" (Tr.

39). Tharpe heard the shot, felt his head bleeding, and jumped behind the counter to await the arrival of the police (Tr. 39). The police arrived and arrested appellant (Tr. 39-40). Tharpe was transported to a hospital, where he was treated for his scalp wound (Tr. 41). Tharpe stated that he had himself had no weapon, and that after the shooting he had observed a gun in appellant's hand (Tr. 41). On cross-examination, the witness admitted that he had been drinking earlier that evening (Tr. 44-45) and that the touching of appellant's daughter had been deliberate (Tr. 46-47), but denied that any physical altercation in the carry-out shop had preceded the shooting (Tr. 49).

Ernest Odell Harris, who on December 11, 1964 was the night manager at the carry-out shop involved (Tr. 54), testified that at about 11:00 p.m. that evening a man (identified as appellant, Tr. 56) entered the shop and asked "who was messing with his daughter" (Tr. 55, 65). Having not received precise information, appellant left the shop, but returned shortly, approached Tharpe and, accused him of improperly touching his daughter (Tr. 56-57, 65-66). Moments later, a gunshot was heard; the witness saw appellant "smack" the side of Tharpe's head with a gun and the gun discharged in that posture (Tr. 58-59, 67). The barrel of the gun was facing up when it was fired and the bullet finally was found in the kitchen of the shop (Tr. 67). According to the witness, Tharpe jumped behind the counter after the shooting and awaited the police, who came shortly thereafter (Tr. 59, 67). The witness testified that Government's exhibit # 1, a small pistol, resembled the gun he had seen in appellant's hand on the night of the shooting (Tr. 60-61).

Detective Melvin Hardy, assigned to the Eleventh Precinct on December 11, 1964 and specifically to Cruiser 211 with Detective Leo R. Halloran, testified that at about 11:15 p.m., while stopped at a traffic light opposite the carry-out shop, he saw appellant enter the shop and

approach a person, later identified as Tharpe (Tr. 75, 77, 86-87). The detective then heard a shot and the two detectives left the cruiser, entered the shop, and arrested appellant (Tr. 75, 87-88). A search of appellant at the time of the arrest did not disclose the gun (Tr. 75, 88), which was later given to the detective by "an unknown subject" (Tr. 75, 79, 88). The gun was identified by the detective (exhibit # 1), as were the slug which had been recovered behind the counter (exhibit # 3A), the shell which had been attached to it before firing (exhibit # 3B), the unfired bullets from the gun (exhibit # 3C), and the clip from the gun (exhibit # 3D) (Tr. 78-80). These exhibits were received in evidence, after a defense objection to the introduction of the gun had been overruled; (Tr. 80-81; see Tr. 113-14). At the insistence of the court, the prosecutor did not question Detective Hardy as to statements which had been made by appellant to the officers at the scene of the arrest (Tr. 83-84).

Detective Leo R. Halloran, Hardy's partner in Cruiser 211 on the night of the shooting (Tr. 90), was the final Government witness, and corroborated the testimony which his partner had given moments before (Tr. 90-93). At this point in the trial, the Government rested (Tr. 93-94),² and a defense motion for a judgment of acquittal on the assault with a dangerous weapon count was denied (Tr. 94-95).

A lengthy discussion, initiated by the court, concerning the question whether appellant was to testify occurred at this point (Tr. 95). In response to the court's question, defense counsel stated that it was appellant's desire not to take the witness stand (Tr. 45). One of the reasons for appellant's desire was his substantial conviction record, which included three felony and six misdemeanor convictions, covering a period from 1946 to 1961 (Tr. 97-98; sentencing transcript 9-11). Defense counsel fur-

² It had earlier been stipulated between the parties that appellant had had no license in the District of Columbia to carry a pistol on December 11, 1964, nor did he have one on the date of the trial (Tr. 71).

ther stated that it was his judgment "that no purpose would be served by him taking the stand" and that "under the circumstances of this case, and from my investigation of it, it would be better for him not to take the stand" (Tr. 96). The court then questioned appellant as to his desire to testify, and determined that appellant himself did not desire to take the witness stand, although he understood that he had a right to do so if he so chose (Tr. 101-02). Finally, in response to the court's query, defense counsel requested that the normal instruction, that no inference one way or the other should be drawn from appellant's failure to testify, *not* be given, and in this request appellant specifically concurred (Tr. 102-03). Although it was explained to appellant that if he testified he might be impeached with prior convictions, the propriety of such impeachment in general, and the *Luck*³ decision in particular, were not mentioned by anyone during the extended conference, nor at any time in the trial.

Appellant's daughter, Gloria Harley, was the sole defense witness, and testified that on the evening in question she was sitting on an automobile in front of her home, when she was approached by the complaining witness, Tharpe, who "came around, grabbed me by my leg, near my private, and went straight down the street." The witness told Tharpe "to keep his hands out, and threw [her] Popsicle at him" (Tr. 106-07). Miss Harley told her mother of the incident, and then told her father (Tr. 107), who went to the closet and procured some unidentified object (Tr. 109). Then father and daughter walked down the street to the carry-out shop (Tr. 107). There Miss Harley saw Tharpe and pointed him out to her father (Tr. 111) who thereupon entered the shop. The witness saw her father hit Tharpe "on the side of the head" (Tr. 108, 112) and heard a gunshot (Tr. 112). The defense case was thus concluded.

³ *Luck v. United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

Initially, the court was prepared to deny a defense request for an instruction on simple assault, the lesser included offense (Tr. 116-117), but after the prosecutor indicated that he himself felt such a charge might be appropriate, the court agreed so to instruct the jury (Tr. 117).

As previously indicated, after closing arguments to the jury and the court's charge, appellant was found guilty of both counts of the indictment (Tr. 152).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 3204, provides:

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

SUMMARY OF ARGUMENT

I

It was not error for the trial court to rule, in advance of trial, that appellant might not adduce evidence that his son had been sexually molested some weeks before the incident here in question, and request an "irresistible impulse" instruction at the conclusion of the trial, where appellant specifically instructed his attorney not to raise the insanity defense. The court, upon being advised by trial counsel of appellant's desires with respect to the insanity defense, interrogated appellant himself, on the record, prior to trial, and ascertained the fact that appellant indeed did not desire to raise the insanity defense. Furthermore, during the pre-trial colloquy between the court and appellant, the judge satisfied himself of appellant's present competency to make that decision.

In this factual context, it was manifestly not error for the court to preclude an "irresistible impulse" instruction at the close of the trial. To allow such a defense out of the context of an unwanted insanity claim, would create a new and unjustified defense to the crime of assault.

II

The trial court was never requested to limit or preclude the use of appellant's prior conviction record for impeachment purposes if appellant testified. The record discloses that the court itself raised the question whether appellant might testify in his own defense. Trial counsel then informed the court that appellant did not desire to testify and it was counsel's best judgment that appellant should not testify. The court then discussed the situation with appellant personally, out of the presence of the jury, and determined that appellant himself did not desire to take the witness stand and concurred in his counsel's view that it was best that he did not testify. The court explained fully the entire range of consequences surrounding appel-

lant's decision. Trial counsel at no time cited to the court the *Luck* decision, nor suggested that appellant might desire to testify if he was assured that the prosecutor's use of his prior conviction record might be curtailed. In these circumstances, it is abundantly clear that the court did not abuse a discretion which was never invoked, when it intimated that appellant if he testified might be impeached by use of his prior convictions.

III

Appellate counsel should not be allowed to challenge the lawfulness of the admission into evidence of the gun on the basis of unsworn allegations made in his brief in this Court for the first time, and not advanced at the trial. Trial counsel did not move to suppress the gun in advance of trial, and when he did finally object to its admission at the trial, did not request a hearing in which allegations of the type that are here initially raised might be aired. In any case, no statement of appellant was adduced at any point in the trial, and, on defense counsel's own postulation of the facts, the gun was obtained by the police from an unidentified third party at the scene of the assault.

ARGUMENT

- I. The trial court did not err by ruling that appellant might defend by resort to the doctrine of "irresistible impulse" only if he formally entered an insanity defense.

(Tr. 4-9, 12-13)

Before the commencement of the trial, appellant specifically instructed his attorney not to raise the insanity defense (Tr. 4). Defense counsel brought this instruction to the attention of the court with the comment that nevertheless, at the conclusion of the trial, he might request an instruction based on the doctrine of irresistible

impulse.⁴ The court then expressed the view that the "irresistible impulse" defense existed, if at all,⁵ only in the context of an insanity defense and that counsel and appellant would have to decide at that point, in advance of trial, whether or not the insanity defense was to be raised (Tr. 5-6). Having previously been instructed not to raise the defense, counsel thought it best if appellant himself stated his desires on the record. Appellant then personally agreed that it was his wish that the insanity defense not be raised, after which the court satisfied itself that appellant was competent to make that decision (Tr. 7-8). Thereupon counsel agreed that the issue was settled and that he would not, at the conclusion of the trial, request an insanity instruction (Tr. 8-9). Counsel further agreed that appellant's desires as thus expressed foreclosed any possibility that evidence might be introduced that appellant's son had been sexually assaulted (by a third person) some weeks before the events giving rise to the instant prosecution (Tr. 12-13). That incident had no other relation to the instant events, except perhaps to the extent that its remembrance might have spurred within appellant the urge to retaliate for complainant Tharpe's unwarranted touching of appellant's daughter. Outside the context of an insanity defense, any such urge, of course, would have no bearing on, and would in no manner constitute a defense for, the charges which were then before the court for trial. Realizing this elementary evidentiary rule, the parties made no further mention of the unconnected incident during the remainder of the trial.

⁴ *Smith v. United States*, 59 App. D.C. 144, 36 F.2d 548 (1929).

⁵ The *Smith* irresistible impulse rule was obviously modified when the insanity standard was changed in the District of Columbia, so that today it exists only as an adjunct of the much broader *Durham-McDonald* rule. See *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954); *McDonald v. United States*, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962); *Misenheimer v. United States*, 106 U.S. App. D.C. 220, 271 F.2d 486 (1959).

In this setting, appellant now suggests that the court erred in preventing him from raising an irresistible impulse defense by placing before the jury the obviously irrelevant fact of the prior assault on his son, even though he admits that an insanity plea was "neither warranted nor necessary" (Appellant's Brief, p. 8). In reality appellant seeks, without the citation of a single authority, to create a new legal defense to the crime of assault, which he variously characterizes as "paternal instinct" and "a father's natural reaction" (Brief, pp. 7, 8). The new defense is necessary in this case, appellant apparently realizes, because accepted defenses are unavailing; appellant in his brief admits that after being told by his daughter of the improper touching, he should not have procured a gun and carried it the length of the street in order to use on the complainant in an effort to obtain redress for the indignity visited by the complainant on appellant's daughter (Brief, pp. 6-7).

Appellee submits, simply, that appellant's attempt to create a new defense to the crime of assault with a dangerous weapon should be rejected categorically, for it is justified neither in reason nor in law. This court should not, it is submitted, place its imprimatur—in the name of parental instinct—on the doctrine of armed self-help, especially on facts such as are here presented. Even if the provocation appellant relies on had occurred in front of his very eyes, which it did not, shooting the unarmed provoking party could in no way be justified.

II. The trial court's discretion to preclude the use for impeachment purposes of appellant's conviction record was in no manner invoked.

(Tr. 95-97, 101-05)

Appellant contends that the trial court improperly concluded that if appellant elected to testify, he might be impeached with his rather lengthy record of prior convictions. In so contending, appellant fails, as did defense

counsel in the trial court, to cite the leading case in this Circuit dealing with prior-conviction impeachment, *Luck v. United States*, *supra* note 3, which established in trial judges a discretionary control over the use of such impeachment, which discretion must be utilized if properly invoked whenever a defendant with a prior criminal record is about to take the witness stand.

The factual setting in which appellant's present contention is made should be emphasized. Immediately following the denial of a motion for a judgment of acquittal, after the conclusion of the Government's case in chief, the court on its own initiative inquired whether appellant was to testify in his own defense. Defense counsel answered "I have discussed that matter with him, and he indicates to me that he would not like to take the stand" (Tr. 95). The court then asked whether appellant had a criminal record, and it was determined that appellant indeed did have a long record dating back twenty years. In response to further questions of the court, defense counsel explained that although he had advised appellant of his "perfect right to testify," it was his (counsel's) "judgment that it would be better for him not to take the stand" (Tr. 96). Counsel told the judge that appellant had agreed that it would be advisable for him not to testify (Tr. 96-97). Notwithstanding this colloquy, the court deemed it advisable to determine from appellant personally what his desires were, and thereupon conducted a discussion with appellant. During the discussion appellant advised the court that he had fully discussed the problem with his attorney and had agreed that it was best not to take the witness stand. Appellant stated that he had arrived at his decision in an entirely voluntary manner, and, even after the entire range of legal consequences of his decision had again been explained to him by the court, maintained that he did not desire to testify. (Tr. 101-05).

At no time during these discussions, and indeed at no time during the trial, was the *Luck* decision or any of its

progeny⁶ mentioned to the court, nor was it ever suggested that if the court would limit the prosecutor's use of the prior convictions, appellant might testify. This Court's decision in *Hood v. United States*, *supra* note 6, makes it crystal clear that the mere citation of *Luck* to a trial judge in an effort to persuade the judge discretionarily to limit the use of prior-conviction impeachment is far from a sufficient invocation of the court's discretion. *A fortiori*, it is even less sufficient to fail to call the court's attention to the *Luck* case or offer any reason at all why impeachment should be limited. Consequently, where defense counsel does not even request that impeachment be limited, it cannot be argued on appeal that it was error for the court to fail to do so. *Cf. United States v. Indiviglio*, 352 F.2d 275 (2nd Cir.) (*en banc*), *cert. denied*, 383 U.S. 907 (1965).

It will not do, either, to suggest that if appellant had not been faced with the probable use by the prosecutor on cross-examination of his lengthy record, he would have testified. Neither appellant nor his counsel ever suggested that possibility. It is a reasonable inference from the record, and from appellant's repeated assertions that he really did not desire to take the stand, that the true reason for his testimonial reluctance was the fact that if called to the stand he would have been forced to admit in court that indeed he had struck the complaining witness with his own gun, which had fired during the process, injuring the complainant. The prosecution's evidence was unequivocal that appellant had assaulted Tharpe. In fact, appellant's daughter, when called by defense counsel, agreed on direct examination that her father had struck Tharpe with the gun, which had then discharged. Ap-

⁶ See *Smith v. United States*, 123 U.S. App D.C. 259, 359 F.2d 243 (1966); *Walker v. United States*, 363 F.2d 681 (D.C. Cir. 1966); *Hood v. United States*, 365 F.2d 949 (D.C. Cir. 1966); *Trimble v. United States*, No. 19942, D.C. Cir., decided September 15, 1966; *Stevens v. United States*, No. 19883, D.C. Cir., decided October 20, 1966; *Brown v. United States*, No. 20041, D.C. Cir., decided November 10, 1966; *Covington v. United States*, No. 19717, D.C. Cir., decided December 1, 1966.

pellant's defense was not based upon a denial, but upon sympathy; to take the stand would have been to emphasize and admit to the jury that in fact appellant committed the crimes for which he was being tried.

III. Appellant, having foregone his opportunity below, should not here be allowed to base his contention that the gun was improperly admitted on unsworn, extra-record assertions.

(Tr. 79, 83-84, 113-14)

Appellant's final contention is that the gun with which the instant assault was committed was improperly admitted into evidence. The contention is based on allegations contained in appellant's brief which do "not appear in the record, but must be mentioned on behalf of appellant . . . in order that justice might be served." (Brief, p. 12). The allegations are to the effect that appellant told the officers from whom the gun might be obtained only because the officers told him "that they were very sympathetic toward him but would be unable to help him unless he produced the gun in question." *Ibid.*

Appellee strenuously objects to appellant's method of presenting such extra-record allegations to this Court. It is an elementary axiom of appellate procedure that reviewing courts will consider only those contentions which are based on facts of record, not upon mere untested assertions of appellate counsel. *Beach v. United States*, 80 U.S. App. D.C. 160, 149 F.2d 837, *cert. denied*, 326 U.S. 745 (1945); *Rumely v. United States*, 90 U.S. App. D.C. 382, 394, 197 F.2d 166, 178 (1952), *aff'd*, 345 U.S. 41 (1953). This rule is but a corollary of the requirement that defense counsel adhere to his duty of making his record, or face the loss of a potential appellate claim. *Butler v. United States*, 88 U.S. App. D.C. 140, 188 F.2d 24 (1951).

Here, although appellant entered an objection at the time of the admission into evidence of the gun (Tr. 81-82), no motion to suppress was ever made, perhaps be-

cause appellant throughout these proceedings disclaimed reliance upon an unlawful search and seizure (Tr. 113). In point of fact, no search was ever made by the officers, who received the pistol from an unidentified third party (Tr. 79). In actuality, appellant claimed that the gun had been obtained by the officers as a result of a statement made by appellant at the scene of the arrest (Tr. 113). Whether or not the gun was obtained as a result of a statement, or whether, if it was, the statement was improperly elicited by the police officers, cannot be determined from the record. After suggesting the problem, trial counsel seemed to abandon it following a discussion at the bench (Tr. 114). No hearing was requested or held at any point in the trial regarding any such statement made to the officers by appellant. Furthermore, the prosecutor did not introduce into evidence any incriminatory statement made to the officers by appellant (see Tr. 83-84).

Appellee submits that it is inappropriate for this Court to consider appellant's contention that the gun was improperly admitted into evidence in the context of such an obviously deficient record. Appellate counsel should be bound by trial counsel's failure to request a hearing and to elucidate on the record the bases, if any, for his contention. Having failed to utilize his opportunity to do so below, appellant should not be allowed to rely upon unsworn extra-record allegations made to this Court for the first time.